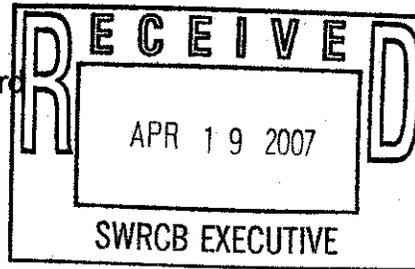


Ms. Song Her, Clerk to the Board
State Water Resources Control Board
Executive Office
P.O. Box 100
Sacramento, CA 95812-0100



April 19, 2007

Dear Ms. Her:

The Department of Water Resources (DWR) has reviewed the State Water Resources Control Board (SWRCB) Informational Document for the Public Scoping Meeting for the Proposed Wetland and Riparian Area Protection Policy (Policy), dated March 2007.

As a result of our review of this document and staff's attendance at the public scoping meeting held on April 9, 2007, DWR is very concerned about the potential effects additional State wetland and riparian regulation, as proposed in the Policy, could pose on DWR's ability to (1) operate and maintain the State Water Project and (2) to participate with other agencies in the repair, maintenance, and improvement of the State's flood control system, including levees, weirs, and channels, that serves to protect Californians' lives, jobs, and property.

The maintenance of flood control facilities, in particular, is critically important and already subject to complex and overlapping regulations from many federal and State agencies. Conflicting regulatory objectives, technically demanding applications requirements, and extended permits and decisions processes, produce cumulative restrictions on flood project repair, maintenance, and improvement projects. These cumulative restrictions can prevent or delay timely and effective flood project maintenance, especially by smaller local agencies. It is essential that the proposed Policy not exacerbate these problems if millions of Californians are to be protected from flooding. As a result, DWR believes that further evaluation of the alternatives contained in the proposed Policy and their effects on public safety issues, such as flooding, needs to be conducted.

In addition to the above concerns, DWR wishes to submit the following initial comments in regards to the proposed Policy:

A. General Comments:

1. In addition to SWRCB and the nine Regional Water Quality Control Boards (Regional Water Boards), it is evident that a growing number of State and federal agencies commonly use the federal definition and delineation of wetlands due to its corresponding integration with Section 401 (Water Quality Certification Program) of the California Clean Water Act. Under the proposed Policy, a formal adoption of the federal definition of wetlands based on the United States Army Corps of Engineers' (USACE) 1987 Wetlands Delineation Manual, by the

SWRCB and Regional Water Boards would provide more uniform and equitable regulation and should not conflict with their additional authority under, but not solely limited, to the California Water Code and Water Quality Control Plans (Basins Plans). This would also provide more consistent consideration of issues by State and federal agencies on wetland impacts.

2. The proposed Policy and subsequent CEQA documentation, with the proper input, would create a more scientifically-based regulatory framework for protection of water resources than currently exists. For example: Areas that don't meet the federal definition of wetlands, but which are scientifically recognized as being important in water quality and biodiversity issues, such as vernal pools, would be included.

3. The SWRCB's reference to a CEQA document appears to be the equivalent of an environmental impact report (EIR) and should address, but not be limited to, the impacts of increasing regulatory complexity on the ability of agencies, land owners, flood control districts, to maintain flood control facilities. As the ability to perform maintenance activities decreases for these entities, flood risks increase with greater probability of facility failure during high water causing loss of life, property damage, and adverse impacts to listed species.

4. In January 2005, DWR's Division of Flood Management prepared a "White Paper" report on flooding issues and identified complex environmental regulation as a key impediment to flood project maintenance. Many of the State's flood channels include jurisdictional wetlands. Riparian vegetation often encroaches into channels or along the base of levees, especially during periods when maintenance is reduced by funding or other constraints. Many flood channels also include mud and sand flats that require frequent maintenance. All would be subject to these new policies and rules, which would substantially impede routine flood project maintenance that is essential to protecting lives, personal property, and infrastructure.

5. The proposed Policy, superimposed over existing federal regulations, could easily create a regulatory maze of partially overlapping rules and permits that may or may not properly integrate with each other, making an already complicated situation even worse (e.g., different sets of forms, different document formats, different data requirements, etc.).

6. Reliance on waste discharge requirements (WDRs) or waivers of WDRs as the implementation method for regulating sites or activities that are unregulated under Section 404 rules (e.g., not requiring 401 certification) of the Federal Clean Water Act (FCWA) will also be especially burdensome. WDRs and waivers have the most rigid and often the longest of any regulatory approval received, because they require a formal public notice period and action at a regularly scheduled Regional Water Board hearing. In the case of the Central

Valley Regional Board, such a hearing occurs less than once a month. Currently, DWR applications for WDRs or waivers must sometimes be submitted ten weeks or more before final board action is issued. By contrast, approval for many activities regulated by the USACE under FCWA Section 404 can be obtained in 45 days or less under expedited permitting procedures.

7. Any new policy should include the following: Regulations that are completely inclusive of federal requirements, i.e., preparation of documentation for State agencies' permitting can (with minor or no modification) also be submitted to USACE, and compliance with State regulations automatically complies with federal regulations. Clear provisions for streamlining of routine maintenance of constructed flood-control features (e.g., levees, ditches, bypass structures, and other features) that don't require huge amounts of time or documentation if no major biological or discharge impacts are planned. A clearly defined process for permit approval that will decrease the time spent waiting for projects to be permitted by the State and Regional Water Boards, with built-in ways to "force" action on permit approval in an expedited manner.

8. Consistency in using existing federal definitions of wetland and riparian areas under State jurisdiction and filling gaps between State and federal protections for wetlands will be beneficial to the "waters of the State". However, the complexity of additional regulations, overlapping jurisdictions, and inconsistent mitigation requirements may cause potential environmental impacts. The SWRCB's analysis should show how the proposed Policy will be defined and implemented so that delays are minimized in permitting projects, such as those designed to improve fish and wildlife habitat, improve sediment transport or stabilize stream banks. Public services, such as flood control, could be impacted if maintenance of levees or flood control structures is delayed. Exemptions or streamlined permits, similar to the USACE Nationwide Permits, for types of projects with minimal impacts or projects designed to improve habitats or water quality could be established.

9. The CEQA analysis for the proposed Policy should document how the new requirements will be efficient and effective in improving the overall level of water quality protection in the State.

B. Specific Comments:

1. Under Alternatives 2, 3, and 4, DWR and local agencies responsible for maintenance of flood control project channels and levees; as well as DWR, Department of Fish and Game (DFG), and local agencies responsible for flood protection and levee project maintenance in the Delta, could be regulated by yet another layer of overlapping regulatory jurisdiction over wetlands, riparian, and related habitats that affect maintenance of the flood control system.

2. Under Alternatives 3 and 4, it appears that a whole new state regulatory system would be created that would also apply to areas where the USACE still retains FCWA Section 404 authority and where the State and Regional Water Boards' Section 401 certification processes would still be available to carry out basin plan policies. Conflicts of application of those overlapping federal and State regulatory activities of differing wetland definitions, jurisdictional boundaries (e.g., also including sand and mudflats and riparian areas above ordinary high water or OHW), would produce multiple complicated and interpretive protection policies, regulated activities, mitigation standards, reporting requirements, etc.. As the SWRCB is considering this proposed Policy to protect wetlands, then it should also consider eliminating duplicative USACE permits by seeking delegation of FCWA Section 404 authority per USC 33, 1344(g), so that applicants have to deal with only a single regulating entity. The SWRCB should integrate the proposed Policy with the other State programs that regulate these areas, such as DFG's streambed alteration agreements under Section 1600 et al of the Fish and Game Code. This is a key issue to flood maintenance activities.

3. It appears that Alternative 3 and 4 propose the inclusion of sand and mud flats within the definition of wetlands which could lead to the regulation many miles of flood control channels' unlined bottoms as wetlands. These areas require frequent maintenance to remove accumulated sediment to assure the channels' ability to pass flood flows. The wetland and riparian definitions under the proposed Policy should be limited to marine and estuarine mud and sand flats.

4. Alternative 3 and 4 would also be especially burdensome to flood maintenance activities by adding new regulation of vegetation clearing and invasive species. Each year DWR maintains many acres of flood control channels by managing or removing vegetation, including trees and other plants that would be considered wetland or riparian vegetation but which do not involve the discharge of fill currently regulated under FCWA Section 404 rules. This work is currently undertaken pursuant to a programmatic streambed alteration agreement with DFG that provide significant protections of wildlife, fish, and water quality functions by limiting the type and amount of vegetation cleared, establishing work windows, prescribing setbacks from streams or other waters, etc.. It appears unnecessary for duplicative and overlapping SWRCB regulation of these activities.

5. Invasive species grow in many channels including flood control channels and bypasses by proliferation from sites of initial invasion elsewhere, often becoming established after washing into channels with flood flows or being carried there as seeds by animals. It is hard to conceive of how these dispersal mechanisms could be regulated by the proposed Policy or of how a regulatory program could effectively control such invasions, especially in Central Valley flood control channels.

Ms. Song Her
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If you have any questions, please contact James L. Martin at (916) 445-6477 / jimm@water.ca.gov or contact me directly at (916) 651-9777 / bmcdonne@water.ca.gov. Thank you for the opportunity to provide comments.

Sincerely,

Barbara McDonnell, Chief
Division of Environmental Services
Department of Water Resources